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No. 24385

***IN THE SUPREME COURT OF CANADA***
(On Appeal from the Appeal Division of the
Supreme Court of Nova Scotia)

BETWEEN:

**HER MAJESTY THE QUEEN**

APPELLANT

- and -

[redacted]

RESPONDENT

- and -

**WOMEN'S LEGAL EDUCATION AND ACTION FUND**

INTERVENER

---

**FACTUM OF THE WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)**

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(On Appeal from the Appeal Division of the
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B E T W E E N:

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APPELLANT

- and -

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## PART I: FACTS

1. The Intervener, the Women's Legal Education and Action Fund (LEAF), is a national advocacy organization engaged in public education, research and test case litigation. Its objective is to secure women's equality rights as guaranteed by the Canadian Charter of Rights and Freedoms. LEAF has developed extensive expertise regarding sexual violence against women and children and access to justice for sexual assault survivors.

2. LEAF was granted standing to intervene by this Honourable Court on November 9, 1993 on the basis that the issues raised in the within appeal raise questions of national importance for women, and in particular for women who are the victims of sexual assault and abuse.

3. The Intervener accepts the statement of facts as set out in the Factum of the Appellant, with the exception of paragraphs 1 and 3, adopts paragraph 1 of the Factum of the Respondent, and offers the following additional facts in order to clarify the historical and relational context in which the abuse of the Complainant is alleged to have been committed.

### A. FACTS OF THE OFFENCE

4. The Complainant testified that the Respondent assaulted her on five separate occasions when he inserted his finger in her vagina and was "moving it around", performing cunnilingus and sucking her breasts. On none of these occasions did the Respondent speak to the Complainant before or during the sexual acts. The Complainant did not move to assist the Respondent in removing her clothes, nor did she say any words or make any movements. On three occasions: January 28th, January 29th and the morning of January 30th, the Respondent perpetrated the acts upon the Complainant while she feigned sleep.

Testimony of [redacted] Case on Appeal, p. 113, l. 10; p. 115, ll. 3 and 20; p. 116, l. 4; p. 117, l. 3; p. 118, l. 17; p. 163, l. 30; p. 164, ll. 1 and 22; p. 165, l. 7; p. 166, ll. 7 and 23; p. 167, l. 32; p. 173, l. 4; p. 174, l. 3; p. 175, l. 7; p. 176, l. 36; p. 177, ll. 1 and 29.

5. The first assault, which involved digital penetration of the Complainant's vagina, occurred while the Complainant was in bed with the flu calling to her mother and the Respondent to remove her six year old sister from her room. The Complainant testified that the Respondent:

> came up and he was yelling at her [redacted] to get out, and then all of a sudden, he started touching me.
>
> Testimony of [redacted] Case on Appeal, p. 112, l. 32.

6. At the trial, when asked why she had not spoken out to the Respondent or called to her mother during the assaults, the Complainant testified on thirteen separate occasions that she was "scared of him" and "scared to say anything":

> Q. Any reason why you didn't speak out to him when he was doing these things?
> A. I was too scared to.
> Q. What do you mean by that?
> A. I was scared of him. I was scared to say anything.
>
> Testimony of [redacted] Case on Appeal, p. 124, ll. 12 and 14; See also: p. 117, l. 25; p. 124, ll. 12 and 14; p. 146, ll. 10, 11, 13; p. 174, l. 8; p. 177, l. 33; p. 178, l. 29; p. 185, ll. 20 and 24.

## B. HISTORICAL CONTEXT OF THE RESPONDENT'S SEXUAL ACTS

7. The Complainant testified that she had reported sexual abuse by the Respondent on two occasions prior to the January 28-30, 1991 incidents. The first report occurred sometime prior to February 1987, before she was 12 years old:

> Q. Okay. Now, even before that, you made an allegation against [redacted] of sexually abusing you by rubbing his foot against your private parts. Is that correct?
> A. Yes
> Q. You told that to your mother.
> A. Yes.
> Q. You later told her that it wasn't true, correct? Is that a yes?

A. Yes. Because I was scared, because she just went up and...I don't know...I was just...I'm just scared of him period. And she went out and she talked to him about it and he said he didn't, and she came back and told me , and I was scared so I told her it wasn't true.

Testimony of [redacted] Case on Appeal, p. 146, l. 1.

8. In February 1987, the Complainant reported to the police that she had been sexually abused by the Respondent. The police explained to her that the Respondent could not be charged because there was no corroboration of her complaint. However, both the Complainant and her younger sister [redacted] were removed from the [redacted] home by the Department of Community Services. Although [redacted] was returned, the Complainant was made a permanent ward of the Crown in March of 1988, and remained in foster care, usually with relatives, for most of the period from February 1987 to June of 1990.

Testimony of [redacted] Case on Appeal, p. 92, l. 16; p. 93, l. 23.

Testimony of [redacted] Case on Appeal, p. 142, l. 5.

9. As a consequence of these allegations of sexual abuse, a family court custody application ensued. The Complainant withdrew her allegations against the Respondent after two meetings with his lawyer. In her evidence, the Complainant explained that she had been coaxed by the Respondent and her mother to withdraw the allegations, and that the Respondent's lawyer had told her that if she didn't change her story her younger sister would be taken away and put in a foster home.

Testimony of [redacted] Case on Appeal, p. 186, l. 4.

10. The Respondent's defence throughout this case was that the Complainant had fabricated the allegations giving rise to the charges, motivated by her dislike for him. It was never the Respondent's position that the Complainant consented to the acts, nor that he honestly believed, on the basis of her behaviour, that she was consenting.

Summation by the Defence, Case on Appeal, p. 218, l. 21.

11. On November 17, 1992, after the Respondent's conviction on the indictment, and prior to the hearing of his appeal by the Court of Appeal, the Complainant was interviewed by the police. For reasons not apparent in the Record, the Complainant had nowhere to live in late 1992 and returned to live in the [redacted] home. The Respondent and the Complainant's mother put pressure on her to tell the police that she had lied at trial and fabricated the allegations against the Respondent. They told her that if she didn't change her story she could stay with the police instead of going home. However, she told the police that the evidence she had given at trial was true.

Statement of [redacted] Exhibit B, Affidavit of [redacted] Case on Appeal, pp. 8.11-8.15.

## C. REASONS FOR JUDGMENT OF THE TRIAL JUDGE

12. The learned Trial Judge convicted the Respondent on the basis of the Complainant's evidence and found as follows:

> The young lady, [redacted] tells a very simplistic story. If believed, it would constitute a sexual assault against the accused in this particular case.
>
> The defence would have the court believe the young lady is a conniving person, is lying, changing stories from time to time for her own basic ends. Quite frankly, I do not believe this. Basically, I believe the testimony of the young lady. I think she was truthful. I think she was straightforward.
>
> Reasons for Judgment of Palmeter C.J., Case on Appeal, p. 233, l. 8.

13. In arriving at his decision the Trial Judge found that the Complainant was an immature and "troubled young lady":

> Now, I say younger person because, although this young lady is seventeen years of age, my interpretation, my assessment of her is that she is not a mature seventeen year old young lady.
>
> I think she has been a troubled young lady. I don't know whether she still is or not, but she has been a troubled young lady. The evidence of the social worker indicated that. It's not unusual for victims of sexual abuse. In many cases they are never believed -- never believed by even members of their own family.
>
> Reasons for Judgment of Palmeter C.J., Case on Appeal, p. 233, l. 123; p. 235, l. 12.

14. The Respondent appealed against his conviction on three grounds, all unrelated to the issue of consent.

Notice of Application for leave to Amend Notice of Appeal, Appendix A, Amended Grounds of Appeal, Case on Appeal. p. 8.3.

## D. REASONS FOR JUDGMENT OF THE NOVA SCOTIA COURT OF APPEAL

15. The Nova Scotia Court of Appeal raised the issue of consent on its own motion during the course of argument on the appeal and asked the parties to make submissions.

Reasons for Judgment of Freeman J.A., Case on Appeal, p. 252.

16. The Court of Appeal allowed the appeal, set aside the conviction and entered an acquittal, having found that: "a properly instructed jury, acting judicially, would have been left with a reasonable doubt on the essential element of consent."

Reasons for Judgment of Freeman J.A., Case on Appeal, p. 261.

17. In arriving at its judgment the Court of Appeal reviewed the evidence and found:

> There is no evidence of any objection by the complainant, either by word or gesture. On the one occasion when she objected, in the living room while her mother was out of the house, the appellant did not press matters. Without the complainant's silence, indeed, her apparent complicity, the incidents could not have happened as they did. She explained her silence by saying she was "scared" but it was not clear she was afraid of the appellant or anything he might do. There was no evidence of threats or fear of the application of further force. There was no evidence the complainant was so afraid of the appellant that she dared not say "no" or "stop". She might have moved aside or removed his hand or cried out; she might have run downstairs. She did nothing to indicate that the appellant's advances were unwelcome.
>
> In the absence of the four vitiating factors listed in s. 265(3), the complainant must be shown to have offered some minimal word or gesture of objection. Otherwise submission or lack or resistance must be equated with consent.

Reasons for Judgment of Freeman J.A., Case on Appeal, pp. 256 and 259.

18. The Court of Appeal held not only that the Complainant's conduct was "consistent with" consent within the meaning of s. 265(1) of the Criminal Code, but that the Complainant was "complicit" in her own violation.

Reasons for Judgment of Freeman J.A., Case on Appeal, p. 256.

## PART II: POINTS IN ISSUE

19. Whether the Nova Scotia Court of Appeal erred in law in holding that submission or lack of resistance must be equated with consent for the purposes of s. 265(1) of the Criminal Code.

20. It is the position of the Intervener that the Court of Appeal equation of submission or lack of resistance with consent:

a) is wrong in law and is inconsistent with the legal history of s. 265(1);

b) is inconsistent with the legal history of s. 265(3) and:

c) violates s. 15 of the Canadian Charter of Rights and Freedoms on the basis that the interpretation:

   i) is rooted in sexually discriminatory rape mythology.

   ii) denies the personhood of victims of sexual assault, thus denying them equality before and under the criminal law; and

   iii) violates guarantees of equal protection and benefit of the law by providing the least protection from sexual assault to those most vulnerable to such assault, and the least likely to be able to resist their assailants or to have their resistance perceived as resistance, by assailants and the courts.

## PART III: ARGUMENT

### A. SECTION 265(1) OF THE CRIMINAL CODE

#### i) The Legal History of Section 265(1)

21. It is submitted that in this case, the difference between the Trial Judge's decision that the Crown had proven a sexual assault beyond a reasonable doubt, and the Court of Appeal's judgment that the Crown had not proven lack of consent, turns on the Nova Scotia Court of Appeal's interpretation of consent under s. 265(1) of the Criminal Code.

22. It is submitted that the Nova Scotia Court of Appeal reversed 100 years of Canadian rape and sexual assault law and disregarded the jurisprudence on consent in finding that the Complainant: "must be shown to have offered some minimal word or gesture of objection" or be deemed to be consenting.

> Reasons for Judgment of Freeman J.A., Case on Appeal, p. 259.

23. At common law, rape was defined as unlawful and carnal knowledge of a woman forcibly and against her will.

> J. Crankshaw, The Criminal Code of Canada and the Canadian Evidence Act, (2nd ed. 1902), at 275.

24. This definition of rape was adopted in Canada and interpreted as requiring the Crown to establish:

> that the woman has been quite overcome by force or terror, she resisting as much as she could, and resisting so as to make the prisoner see and know that she really was resisting to the utmost; and that if this degree of coercion by the prisoner, and or resistance by the prosecutrix, have not been proved, the crime of rape has not been committed.

C.B. Backhouse, "Nineteenth Century Canadian Rape Law" in Essays in the History of Canadian Law, (D.H. Flaherty, ed. 1983), 200, at 213-220.

R. v. Fick (1866), 16 UCQB, 379, (C.A.), at 383.

25. In 1892, the Criminal Code was first introduced in Canada. The Code's definition of rape replaced the "against her will" terminology of the common law with "without her consent". This definition remained substantially unaltered until 1982. Rape was defined as:

> the act of a man having carnal knowledge of a woman, who is not his wife without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act.

The Criminal Code, 1892, 55-56 Vict., c. 29, s. 266.

26. When sexual assault was incorporated into the general assault provisions under s. 265(1) of the Criminal Code, the "without consent" terminology was maintained. It is therefore submitted that requiring complainants to offer words or gestures of objection or resistance, or be found to be consenting is a return to the "against her will" standard for rape which was in existence prior to 1892. Such a standard is not only inconsistent with the legal history of s. 265(1), but is also inconsistent with judicial considerations of the relationship between consent and acquiescence or compliance.

**ii) The Legal Meaning of Consent Under Section 256(1)**

27. The Ontario Court of Appeal has stated in the context of the constitutionally protected rights of the accused that:

> The danger to constitutionally protected individual rights implicit in the equating of consent with acquiescence or compliance is self-evident and does not require detailed elaboration.... Otherwise consent becomes a euphemism for failure to object or resist.
>
> Acquiescence and compliance signal only a failure to object; they do not constitute consent.

R .v. Wills (1992), 7 O.R. (3d) 337, (C.A.) at 348.

28. The British Columbia Court of Appeal has stated in the context of assault that:

> A consent forced upon him in the presence of his adversaries and not freely made would amount only to a submission, an acceptance of what may have seemed to be inevitable.

R. v. Stanley, supra, per McIntyre J., at 234.

29. It is submitted that in order for consent to be valid in all other areas of law it must be freely given with an appreciation of all the risks and that in determining whether consent exists, Courts must examine all the circumstances surrounding the assault.

R. v. Jobidon, [1992] 2 S.C.R. 714.

R. v. Wills, supra, para. 27.

R. v. Stanley [1977] 36 C.C.C. (2d) 216 (B.C.C.A.).

30. As well, in the context of civil sexual assault cases this Court has recognized that the relative power and powerlessness of the parties will affect consent:

> In my opinion, the unequal power between the parties and the exploitative nature of the relationship removed the possibility of the appellant's providing meaningful consent to the sexual contact.

Norberg v.Wynrib, [1992] 2 S.C.R. 226, per LaForest J., at 261.

31. It is submitted that had the Nova Scotia Court of Appeal scrutinized the trial record for facts consistent with lack of consent, rather than for facts demonstrating resistance, it would have found ample proof of the Complainant's non-consent.

32. According to the evidence introduced at trial and accepted on appeal, the Complainant did not utter one word of consent during the assaults. There was evidence that she made no bodily movements or gestures of consent; there was evidence that she made no sounds signifying consent and made no movements of assistance as the Respondent rearranged her clothes in order

to access parts of her body. Furthermore, it is clear that no inference of consent could be drawn from the history of relations between the Complainant and the Respondent, a history marked by fear and two prior reports of sexual abuse.

Testimony of [redacted] supra, at paragraphs 3-10.

33. It is therefore submitted that the Crown, in examination-in-chief, and the Defence, in cross-examination, covered each and every possible way in which the Complainant could have consented, and that the evidence thereby adduced constituted clear evidence of non-consent.

34. It is also submitted that the Complainant's decision not to call out to her mother during the assaults, or to enlist her support does not constitute evidence of her consent, as implied by the Court of Appeal. The record clearly indicates that the Complainant's mother consistently sided with the Respondent in pressuring the Complainant to withdraw both officially reported charges of sexual abuse, and in choosing not to believe any of her allegations about the Respondent.

Testimony of [redacted] supra, at paras. 7-9.

35. Further, the equation of non-resistance with consent presumes that an assault victim's primary goal is, or should be, to avoid the sexual assault. This assumption ignores the possibility that a woman threatened by sexual assault may perceive resistance to be futile or dangerous, or may have an entirely different goal such as: staying alive; minimizing physical injury; avoiding more invasive, frightening or unwanted sexual acts; or getting the assault over with as quickly as possible.

36. It is clear that there is no one correct response to sexual assault:

> Women know that there is no response on their part that will assure their safety. The experience and knowledge of women is borne out by the Canadian Urban Victimization Study: Female Victims of Crime (1985). At page 7 of the Report the authors note:
>
> Sixty percent of those who tried reasoning with their attackers, and sixty percent

> of those who resisted actively by fighting or using a weapon were injured. Every sexual assault incident is unique and so many factors are unknown (physical size of victims and offenders, verbal or physical threats, etc.) that no single course of action can be recommended unqualifiedly.
>
> R. v. Seaboyer, [1991] 2 S.C.R. 577, per L-Heureux-Dube, dissenting in part, at 652.

## B. SECTION 265(3) OF THE CRIMINAL CODE

### i) The Legal Meaning of Section 265(3)

37. The Court of Appeal reviewed the facts and characterized the Complainant's behaviour as submissive and showing a lack of resistance to the sexual acts of the Respondent. The Court of Appeal then held:

> In the absence of the four vitiating factors listed in s. 265(3), the complainant must be shown to have offered some minimal word or gesture of objection. Otherwise submission or lack or resistance must be equated with consent.
>
> Reasons for Judgment of Freeman J.A., Case on Appeal, p. 258.

38. It is submitted that the Court of Appeal erred in reading section 265(1) conjunctively with section 265(3) to mean that where none of the circumstances codified in section 265(3) exist, proof of non-consent requires proof of resistance. Such an interpretation disregards the legal history of s. 265(3) of the Criminal Code and its predecessors.

### ii) The Legal History of Section 265(3)

39. From 1892 until 1982 when the offence of "rape" was replaced with the offence of "sexual assault", the Criminal Code consistently recognized two conceptually distinct means of establishing the actus reus of criminal assaults. Either the Crown must prove absence of consent on the facts, or it must prove circumstances which legally vitiate consent. Prior to 1982, the offenses of "assault", "indecent assault on a female", and "rape" all maintained this conceptual distinction and were defined as follows:

s. 244 A person commits assault when
a) without the consent of another person or with consent, where it is obtained by fraud, he applies force intentionally to the person of the other, directly or indirectly;

s. 149(2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female person with her consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act.

s. 143 A male person commits rape when he has sexual intercourse with a female person who is not his wife,
a) without her consent, or
b) with her consent if the consent
i) is extorted by threats or fear of bodily harm,
ii) is obtained by personating her husband, or
iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

Criminal Code R.S.C. 1970, c.34; 1974-75-76, c.93, s. 21; S.C. 1972 c. 13, s. 70.

40. Therefore it is submitted that following the reasoning in Jobidon, when Parliament consolidated most sexual offence provisions under one assault section, it maintained the law's historic distinction between lack of consent as a matter of fact, and consent which is legally ineffective because it is culpably induced.

41. As established by this Honourable Court's ruling in Jobidon, had there been facts consistent with consent, the Court of Appeal's interpretation of s. 265(3) was plainly wrong in law. In Jobidon, this Court held that s. 265(3) merely codifies four circumstances long recognized by the common law in which consent to an assault will be legally ineffective, and that these four circumstances are not exhaustive.

R. v. Jobidon, supra, para. 28, per Gonthier J., at 744.

42. It is further submitted that there was no evidence in the trial record of any consent on the part of the Complainant which required the Court of Appeal to resort to s. 265(3) to render

consent legally ineffective, or to apply Jobidon to recognize new circumstances vitiating consent.

## C. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

### i) Introduction

43. The Canadian Charter of Rights and Freedoms is the supreme law of the land. The common law and statutes must be interpreted and applied in a manner which is consistent with the fundamental values enshrined in the Charter.

> Retail Wholesale and Department Store Union v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, per McIntyre J., at 593 and 600.

44. Where a statute can reasonably bear a meaning which would accord with Charter values, such an interpretation should be favoured. In interpreting legislation, "the values embodied in the Charter must be given preference over an interpretation which would be contrary to them."

> Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513, per L'Heureux-Dube at 558.

45. This Court has identified equality as one of the fundamental values of our society, against which the objects of all legislation must be measured. This Court has also stated that section 15(1) is the broadest of all guarantees in the Charter.

> Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, per McIntyre J., at 185.

46. In its most definitive interpretation of s. 15, this Court identified the remedial purposes of the guarantee variously as: "to ensure equality in the formulation and application of the law"; "to protect those groups who suffer social, political and legal disadvantage in society"; "to ensure law-made distinctions among citizens do not bring about or re-enforce group disadvantage"; and "to promote a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration".

Andrews, supra, per McIntyre J. at 171, per Wilson J. at 154.

47. This Court has recognized that in criminal proceedings, s. 7 guarantees to life, liberty and security of the person encompass broader societal interests than those of the accused. These interests include those of complainants who, as a class, are entitled to security of the person and to equal benefit of the law as guaranteed by ss. 15 and 28 of the Charter.

> It has been suggested that s. 7 should be viewed as concerned with the interests of complainants as a class to security of the person and to equal benefit of the law as guaranteed by ss. 15 and 28 of the Charter ... Such an approach is consistent with the view that s. 7 reflects a variety of societal and individual interests.

R. v. Seaboyer, supra, para. 36, per McLachlin J., at 603-604.

48. It is submitted that the pervasiveness of sexual violence and the law's historically ineffective response to it have consistently undermined the social recognition, achievement and exercise of the incidents of full personhood of women, and in particular, their security of the person and right to equal benefit and protection of the law, and that the resistance standard of consent adopted by the Court of Appeal would perpetuate this social and legal history of inequality.

**ii) Sexual Violence as an Equality Issue**

49. This Honourable Court has recognized the link between sexual assault and women's inequality.

> It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women.
>
> The reality of the situation can be seen from the statistics which demonstrate that 99 percent of the offenders in sexual assault cases are men and 90 percent of the victims are women.

Osolin v. The Queen, [1993], unreported decision of the Supreme Court of Canada, per

Cory J., at 17-18.

50. It is submitted that women as a class are singled out for sexual assault because they occupy an inferior social status as females, including being socially defined as appropriate targets for forced sex. As a result of these perceptions, women are more vulnerable to sexual assault. Social inequalities are also directly related to the incidence of victimization. Studies show that two factors operate in the rapist's selection of a victim: availability and vulnerability. The more disadvantaged, dependent, or relatively powerless an individual, the more vulnerable to sexual exploitation and violation.

51. Moreover, the factors which make all women and children potential targets of sexual assault operate to place certain women and children at even greater risk. For instance:

a) Older women, women living in poverty, women with disabilities, rural women, lesbians, women of official language minorities, women of colour, young women, immigrant and refugee women, Inuit women and aboriginal women are particularly vulnerable to violence;

b) Young women are especially vulnerable to sexual assault. 51% of all sexual assaults happen to women between the ages of 16 and 21. Most of the violence is perpetrated by men known to the women, particularly those adult men in positions of authority, for example teachers, fathers and employers.

The Canadian Panel on Violence Against Women, "Part Three: Experiencing Violence - Populations" in Changing The Landscape: Ending Violence--Achieving Equality, (Final Report, 1993), at 59-99.

c) Three in four victims of sexual assault are female children, one in four are male children. It is submitted that children are singled out for sexual assault because of their age and sex, that is because of their vulnerability, accessibility, powerlessness and perceived lack of credibility.

The Canadian Report of the Committee on Sexual Offences Against Children and Youths (1984), Badgley Report, p.198.

52. It is therefore submitted that the adoption of a resistance standard for consent in sexual assault law not only fails to provide security of the person and equal protection and benefit of the law to women as a class, but compounds the inequality of the least powerful and most

vulnerable groups of women and children within society.

### iii) Rape Myths as a Factor of Women's Inequality

53. In Anglo American legal systems, laws, as well as their judicial interpretation, have played a unique role in maintaining and legitimating women's inequality to men. Laws relating to sexual assault were developed, promulgated and administered exclusively by men, the perpetrator group, reflecting and enforcing their perspectives about male and female sexuality. Such laws operated without reference to or regard for the experience and perspectives of women and children, the victim group, without concern for the inequality of the sexes, and in the absence of equality guarantees, constitutional or statutory.

Backhouse, supra, para. 24, at 200-247.

C. Boyle, Sexual Assault (1984), Chapter One, esp. at 4-16.

54. Many legal doctrines governing sexual assault were exceptions to general rules of evidence; rules requiring evidence of recent complaint and corroboration; rules governing the admissibility and probative value of the complainant's reputation for chastity; and the complainant's sexual history are infamous examples.

Backhouse, supra, at 220-226, and 233-235.

Boyle, supra, at 6-7.

55. With its successive reforms in 1976, 1982, and 1992, it is submitted that Parliament sought to reduce or eliminate the scope and operation of such discriminatory rules of evidence in the prosecution of sexual assault charges.

Criminal Law Amendment Act, 1975, S.C. 1974-75-76, c. 93, s. 8.

The Act to Amend the Criminal Code in Relation to Sexual Offenses and other Offenses Against the Person and to Amend Certain Other Acts in Relation Thereto or in Consequence Thereof, S.C. 1980-81-82-83, c. 125.

> Preamble, Bill C-49, An Act to Amend the Criminal Code (sexual assault), 3rd session, 34th Parliament, 40-41 Elizabeth II, 1991-92.

56. This Honourable Court has also rejected gender biased rules of evidence and in doing so has recognized the role that groundless rape myths and fantasized stereotypes have historically played in sexual assault cases. This Court has discredited such myths when confronted with them:

> A number of rape myths have in the past improperly formed the background for considering evidentiary issues in sexual assault trials. These include the false concepts that: women cannot be raped against their will; only "bad girls" are raped; anyone not clearly of "good character" is more likely to have consented.
>
> R. v. Osolin, supra, para. 49, per Cory J., at 19.
>
> These inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse in any event, were less worthy of belief. These twin myths are now discredited.
>
> R. v. Seaboyer, supra, para. 36, per McLachlin J., at 604.

57. In her dissenting judgment in Seaboyer, Madame Justice L'Heureux-Dube sets out the most common myths and stereotypes, the first of which is:

> 1. Struggle and Force: Woman As Defender of Her Honour.
> There is a myth that a woman cannot be raped against her will, that if she really wants to prevent a rape she can.
>
> The prosecution attempts to show that she did struggle, or had no opportunity to do so, while the defence attempts to show that she did not.
>
> R. v. Seaboyer, supra, para. 36, at 651-652

58. In the case on appeal, the defence strategy played on long standing rape myths. Its primary object was to portray the Complainant as a conniving liar motivated by animosity towards the Respondent.

> Summation by the Defence, Case on Appeal, p. 213, l. 18.

59. The Court of Appeal, in overturning the conviction, appears to have played on other long standing rape myths.

60. It is submitted that the Court of Appeal's equation of non-resistance with consent appears to be based on the myth that every woman will struggle to prevent a sexual assault, and that absent a struggle, the victim must have been consenting.

61. The concept of consent is rooted in a belief in the equality of all individuals and respect for their autonomy, agency, and free will. Where consent converts what would otherwise be an attack on one's body, mind and dignity into a lawful act, the interpretation of consent must be one which respects the principles of individual autonomy and agency of the person whose lack of consent is at issue.

> While it is necessary to avoid an overly broad approach to consent, it is also necessary to recognize that valid consents reinforce the principle of individual autonomy which underlies the rights set out in the Charter.
>
> R. v. Wills, supra, para. 27, at 349.

62. It is submitted that the logical consequence of equating silence with non-resistance, and non-resistance with consent, is to render all females presumptively available for the sexual use of any man, unless and until they perform affirmative acts of resistance. Putting the burden on the targets of sexual violence to resist, undermines the right of women and children to be free from invasions upon their person, thereby undermining their entitlement to respect as autonomous persons.

63. It is further submitted that the effect of a presumption that silence equals non-resistance, and non-resistance equals consent, is to deprive women and children of the equal protection of the law of assault.

64. Were Canadian law to respect the right of women and children to physical and mental integrity, it would promote an understanding of consent as something a woman does, rather than something a man thinks about a woman, or a court presumes about her. It would analyze consent

from her perspective, as her choice to participate, in the context of her situation. It would not uphold a paradigm of sexual contact where a inert young girl, pretending to be asleep while being digitally penetrated by a stepfather, is presumed to be engaged in consensual sexual relations.

65. Were Canadian law to respect the right of women and children to physical and mental integrity, it would insist that consent, in sexual assault law, as in other areas of law requires individual free agency, an informed choice freely acted upon by an autonomous individual.

66. It is LEAF's submission that so long as the law legitimates a view of sexual relations which allows an assailant or a court to presume any individual sexually accessible and willing until she fends off an assault, it will legalize the sexual violation of the relatively powerless. Those most likely to be sexually abused and least likely to resist their assailant will be declared by law to be consenting "partners" in their own violation.

## PART IV: ORDER REQUESTED

67. Based on the principles outlined above, LEAF submits that this appeal should be allowed, the conviction of the trial Judge restored and that a declaration be made that the majority's interpretation of consent in the Court of Appeal is unconstitutional.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Chantal Tie

"Jean Whalen"

Jean Whalen

Counsel for the Women's Legal Education
and Action Fund

## PART V - AUTHORITIES

### A. CASES



### B. OTHER AUTHORITIES

**C. STATUTES**